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Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1829

GRIFFIN B. BELL, *et al.*,
Petitioners,

v.

LOUIS WOLFISH, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AS AMICUS CURIAE

EDWARD I. KOREN
RALPH I. KNOWLES, JR.
MATTHEW L. MYERS
ALVIN J. BRONSTEIN
National Prison Project
American Civil Liberties Union
Foundation
1346 Connecticut Avenue, N.W.
Suite 1031
Washington, D.C. 20036
(202) 331-0500

Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE

The National Prison Project of the American Civil Liberties Union Foundation, Inc. is a non-profit, tax exempt corporation engaged in efforts through litigation, legislation and education to improve conditions of confinement in prisons, jails and juvenile institutions throughout the country and to develop and support rational, less costly, humane and effec-

tive alternatives to traditional incarceration. The Project has historically focused primarily upon litigation through its own staff counsel and support staff as well as volunteer cooperating attorneys and lay personnel throughout the various states. It also functions as a resource center for lawyers, legislators, corrections officials and courts.

Included in the broad range of litigation in which the Project has participated directly or as *amicus curiae* are the following cases: *DiMarzo v. Cahill*, 575 F.2d 15 (1st Cir. 1978), *cert. den. sub. nom., Hall v. DiMarzo*, ___U.S. ___, 47 U.S. L.W. 3295 (1978) (jail conditions declared unconstitutional); *Inmates of D.C. Jail v. Jackson*, 416 F.Supp. 119 (D.D.C. 1976), *aff'd in substance*, No. 75-1668, (D.C. Cir. June 5, 1978) (jail conditions declared unconstitutional); *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), *aff'd in substance, sub. nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. den. in relevant part, sub. nom. Alabama v. Pugh*, ___ U.S. ___, 98 S.Ct. 3057 (1978) (prison system conditions declared unconstitutional); *Battle v. Anderson*, 376 F.Supp. 402 (E.D.Okla. 1974), *aff'd* 564 F.2d 388 (10th Cir. 1977) (prison conditions declared unconstitutional); *Trigg v. Blanton*, No. A-6047, Memorandum Opinion (Chancery Court, Davidson County, Tennessee, August 23, 1978) (prison system conditions declared unconstitutional); *Palmigiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977) (prison system conditions declared unconstitutional); *Bono v. Saxbe*, 450 F.Supp. 934 (E.D. Ill. 1978) (certain conditions of confinement at federal prison declared unconstitutional); *Clonce v. Richardson*, 379 F.Supp. 338 (W.D. Mo. 1974) (involuntary transfer of federal prisoners into behavior modification program declared unconstitutional); *Procunier v. Navarette*, ___U.S. ___, 98 S.Ct. 855 (1977); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Procunier v. Martinez*, 416 U.S.

396 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972).[1]

Amicus Curiae believes that if the Court were to adopt the position of the United States in this case it would seriously jeopardize the rights of prisoners confined in city and county jails as well as the ability of the *amicus* to protect those rights.

Consents to the filing of this brief have been given by all parties and have been heretofore filed with the Court.

SUMMARY OF ARGUMENT

It has long been established that basic principles of fundamental fairness and the Constitution presume a person innocent until proven guilty and that pre-trial detainees may not be punished in any way or be subjected to any unnecessary deprivations which are unrelated to insuring their appearance at trial. Thus, any standards by which deprivations are measured for convicted offenders are not applicable to this case.

In spite of its protestations to the contrary, the United States is proposing a radical departure from established legal principles that have been applied for the last decade by various courts which have addressed these issues. The government argues that only deprivations which exceed the minimum threshold of the Eighth Amendment should

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[1] It is of ironic significance that in *Battle, supra* and *Newman, supra*, the United States joined the National Prison Project in urging that the Constitution required the states of Oklahoma and Alabama to provide more living space for its prisoners than was provided by the Bureau of Prisons for federal prisoners prior to the order of the district court in the case at bar.

be prohibited in this case. The government is contending therefore that pre-trial detainees may be punished, as long as the punishment is not cruel and unusual.

The government's position has been firmly rejected by the various Courts of Appeals, and rightly so, given the history of abuse and atrocity in our nation's jails. Appropriate intervention by the courts, when other governmental officials have neglected their responsibility, has been responsible for significant reform. Although the Department of Justice, in litigating against state and local jails, has argued for it, they now, with respect to their own federal jail, attempt to reject ". . . the following propositions as 'now firmly embedded in the law.' The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent that necessary to assure appearance at trial and security of the jail." *Rhem v. Malcolm*, 507 F.2d 333, 336 (2nd Cir. 1976).

The positions argued by the United States on each specific issue in this case are contrary to every set of professionally recognized standards, including the tentative standards promulgated by the Department of Justice. It is irrational, and highly inappropriate, for the United States to argue one set of legal principles and for the application of minimum professional standards to state facilities, but to ask this Court to permit a different set of principles and standards for its own facilities. This is not federalism but despotism.

Because the decision of the Court of Appeals is a very narrow one, dealing with only a few specific issues, and is consistent with the decisions of the other courts of appeals, as well as all recognized professional standards, there are no special and important reasons for review by this Court.

The decision of the Court of Appeals should be affirmed, or the writ of certiorari should be dismissed as having been improvidently granted.

ARGUMENT

I. THE UNITED STATES' POSITION IN THIS CASE IGNORES THE HISTORICAL AND LEGAL DEVELOPMENTS WITH RESPECT TO THE STANDARD OF REVIEW OF THE CONDITIONS OF CONFINEMENT OF PRE-TRIAL DETAINEES OVER THE LAST DECADE.

In spite of its protestations to the contrary and its convoluted "three-tier" approach to the question of the appropriate standard in pre-trial detention case, the United States in its brief proposes a radical departure from well-established legal principles that have been applied virtually without exception over the last decade.[2] Courts have long held that basic principles of fundamental fairness and the Constitution presume a person innocent until proven guilty and that pre-

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[2] The government's "three-tier" approach is apparently as follows: 1) fundamental rights which require a compelling necessity test; 2) rights deeply rooted in the nation's history and traditions which require a closer, but not strict, scrutiny to determine whether there is a reasonable relationship to any governmental interest including jail order, security, fiscal economy and administrative feasibility; 3) non-fundamental rights which do not fall within the first two tiers, and which require only a reasonable relationship to any governmental interest, including those listed in the second tier above.

As we point out in the text of our brief, the government's convoluted approach is a radical departure from the case law developed over the past decade; ignores the fact that pre-trial detainees, although presumed innocent, have lost their most fundamental right of freedom; and would create an irrational measuring of interests which would dictate how "closely" the courts should look at particular situations.

trial detainees may not be punished in any way or be subjected to any unnecessary deprivation which is not related to insuring his or her appearance at trial.

The government's position in this case is clearly at odds with these well established principles. Although it argues at one point that "due process requires that punishment not be inflicted or correction undertaken prior to adjudication of guilt" (Pet. Brief at 23), it later adopts the position that pre-trial detainees may be subjected to severe and substantial deprivations as long as they do not fall below "a minimum threshold of decency and humane treatment and [are] reasonable in light of the government's substantial administrative and fiscal concerns" (Pet. Brief at 49).

The government goes on to argue that the "minimum threshold" is the Eighth Amendment level of cruel and unusual punishment which applies to convicted offenders (Pet. Brief at 24 and 54 n.42). Thus the government is contending that detainees may be "punished" as long as the punishment is not "cruel or unusual."

A. The Background To Litigation Involving the Conditions Of Confinement Of Pre-Trial Detention.

Conditions in American jails and the treatment afforded to those confined in them – both pre-trial and convicted persons[3] – is and has been a national disgrace. Professional

[3] Over 150,000 persons are confined in our jails. Approximately 50,000 of these are awaiting trial. United States Department of Justice, Law Enforcement Assistance Administration, *The Nations' Jails* (1975). It is further estimated that between 1.5 million and 5 million persons per year pass through or jails. National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, (1973) at 275 (hereafter NAC Standards).

commentators,[4] national commissions,[5] former[6] and present[7] Directors of the Federal Bureau of Prisons, and judges[8] are unanimous in their outrage and condemnation.[9] A preeminent psychiatrist with nationally recognized expertise has stated:

> Some people – and I am proud to be numbered among them – are so deeply and continuously disturbed by the knowledge of the great American

[4] Hans E. Mattick, "The Contemporary Jails in the United States," *Handbook on Criminology*, ed. Glaser (Rand McNally: Chicago 1974); Ronald Goldfarb, *Jails*, (Anchor Press, 1976); Richard McGee, *Our Sick Jails*, 35 Fed. Prob. 3 (March 1971); Comment, *Incarcerating the Innocent*, 21 Buff. L.R. 891 (1972).

[5] President's Commission on Law Enforcement and Administration of Justice, *Task Force: Corrections*, 24 (1967); *The Challenge of Crime in a Free Society*, A Report of the President's Commission on Law Enforcement and Administration of Justice 1978 (1967).

[6] Myrl E. Alexander, *Jail Administration* (Charles Thomas, Springfield, Ill., 1957) at 310.

[7] Norman Carlson, *The Law and Corrections*, 6 U. San Fran. L.R. 77, 83 (1971).

[8] For example, "Address of Chief Justice Warren E. Burger," *Proceedings of the National Conference on Corrections*, Williamsburg, Va., December 5-8, 1971, 10, 12; *Rhem v. Malcolm*, 371 F. Supp. 594, 636-7 (Lasker, J., S.D.N.Y. 1974) and *Pugh v. Rainwater*, 557 F.2d 1189, 1191-2 (5th Cir. 1977).

[9] Also see, Freed and Wald, *Bail in the United States: A Report to the National Conference on Bail and Criminal Justice*, 43-5, 1964.

jail atrocities that we cannot keep still about it. We write letters, we make speeches, we harangue our friends . . .

This great horrible cruelty is being practiced in semi-secret in over 4,000 places! One-hundred and fifty thousand human beings, mostly young ones, are locked up in cages and dungeons in the name of 'justice' and mercy by agents of the very people who are being wronged. This expensive, futile, absurd, cruel business does not rehabilitate anyone; it does not reform anyone; it does not change anyone for the better. It only enrages and stupefies and crushes already unstable, misdirected and confused people . . .

Unless we stop it, the shame of our jail system will hang about our necks like an albatross along with the shame of our slaughter of the American Indians and our unspeakable century of slave traffic.

Karl Menninger, *Our Dreadful Jails*, 6 San Francisco, L.R. 1, 6 (1971).

One court after another, in jurisdictions all over the country, have found similar conditions:

> . . . confinement in cramped and overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same sub-human state, no exercise or recreation, little if any medical attention, and for those who in despair or frustration lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette . . .

> The cruelty is a refined sort, much more comparable to the Chinese water torture than to such crudities as breaking on the wheel. The expert testimony, uncontradicted and not successfully challenges, supplies this evidence. Most jails are bad, but this one is unusually bad.
>
> *Jones v. Wittenberg*, 323 F.Supp. 93, 99 (N.D.Ohio 1971)

These conditions have been with us for centuries, remaining unknown to the general public and impervious to several waves of non-judicial reform efforts both private and governmental.[10]

It was not until the last decade that judicial intervention occurred. Spurred on by this Court's resuscitation of the Civil Rights Act of 1871 in *Monroe v. Pape*, 363 U.S. 167 (1961), it's extension to prisoners in *Cooper v. Pate*, 378 U.S. 546 (1964), and the added impetus of governmental reports and professional recommendations, judges began looking into jail conditions. Many lawsuits were filed and the reported cases on the subject are now legion.[11] The United States Department of Justice over the past decade has been an important participant in this process. Through the Law Enforcement Assistance Administration, it has funded research, reports and standards projects[12] across the country.

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10 In general, see Goldfarb, *Jails, supra* at 9-13; Rothman, *The Discovery of the Asylum* (Little Brown & Co., 1971); and Rothman, *Of Prisons, Asylums and Other Decaying Institutions*, 26 Public Interest (1972) at 1-17.

11 See cases cited *infra* at pp. 13, 14 and 22-27.

12 For example, LEAA has supported NAC corrections standards, the American Correctional Association *Manual of Standards for Adult Local Detention Facilities* (hereafter ACA Standards), and the National Sheriffs Association standards.

Through the Department's Civil Rights Division and local United States Attorneys' offices, they have filed lawsuits intervened in ongoing cases and participated as *amicus curiae* in jail and prison litigation.

B. From Legal Developments During The Last Decade Has Emerged The Recognition Of A Standard To Determine The Constitutional Adequacy Of Conditions Of Confinement For Pre-Trial Detainees.

The standard utilized by the courts below in this case as well as in other pre-trial condition cases is over two centuries old and as such is deeply rooted in Anglo-American jurisprudence.

> Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county jail by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law. But this imprisonment, as has been said, is only for safe custody, and not for punishment; therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters nor subjected to other hardships than such as are absolutely requisite for the purposes of confinement only.
>
> Book IV Blackstone §337, p. 2523 (1765).

This fundamental notion of fairness and the logic that pretrial prisoners must be afforded better treatment than those

convicted of crimes was raised by foreign observers of the American scene in the 1830's:

> These arrested persons are precisely those for whom well regulated prisons ought to have been built. It is easy in fact to conceive, that he who has not yet been pronounced guilty, and he who has committed but a crime or misdemeanor comparatively slight, ought to be surrounded by much greater protection than such as are more advanced in crime, and whose guilt has been acknowledged.
>
> Arrested persons are sometimes innocent and always supposed to be so. How is it that we should suffer them to find in the prison a corruption which they did not bring with them?
>
> If they are guilty, why place them first in a house of arrest, fitted to corrupt them still more, except to reform them afterwards in a penitentiary, to which they will be sent after their conviction?
>
> G. DeBeaumont and A. DeTocqueville, *On The Penitentiary System in the United States and Its Application in France*, (Philadelphia: Carey, Lea & Blanchard, 1833) (trans. by Francis Leiber) Reprinted 1970 by Augustus M. Kelley, New York, p. 14.

This Court, as long ago as 1885, recognized the fundamental nature of the presumption of innocence in our criminal justice system:

> The principle that there is a presumption of innocence in favor of the accused is the undisputed law, axiomatic and elementary, and its enforcement

lies at the foundation of the administration of our criminal law.

Coffin v. United States, 156 U.S. 432, 453 (1895)

This principle has been repeatedly reaffirmed by the Court over the years. See for example, *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *In re Winship*, 397 U.S. 358, 364 (1970); and *Estelle v. Williams*, 425 U.S. 501, 504 (1976).

Moreover, this Court has repeatedly recognized the peculiar legal status of pre-trial detainees vis-a-vis those found guilty of crimes. In *McGinnis v. Royster*, 410 U.S. 263 (1973), the Court, in affirming the denial of good time credits for "jail time" stated:

> . . . Further, it would hardly be appropriate for the State to undertake in the pre-trial detention period programs to rehabilitate *a man still clothed with the presumption of innocence.*
>
> 410 U.S. at 273 (emphasis added)

See also, *Meachum v. Fano*, 427 U.S. 215, 225 (1976); *Ingraham v. Wright*, 430 U.S. 651, 669 (1977); *Bounds v. Smith*, 430 U.S. 817, 840 (1977) (Rehnquist, J. dissenting); and *Houchins v. KOED, Inc.*, ___ U.S. ___ 98 S.Ct. 2588, 2608-9 and n.34 (1978) (Stevens, J. dissenting).

In the last decade, the Courts of Appeals as well as a host of district courts virtually without exception have accepted the viability of the principle of the presumption of innocence and have applied this principle to cover the conditions of pre-trial custody. Illustrative of these holdings is the Second Circuit decision in *Rhem v. Malcolm*, 507 F.2d 333, 336 (1976):

> As (the district judge) viewed it, the core of plaintiffs' constitutional arguments is that they are not convicted felons but are pre-trial detainees, presumed innocent of the charges against them but imprisoned only for failure to make bail. The judge accepted the following propositions as 'now firmly embedded in the law.' The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail; and the same constitutional provisions prevent unjustifiable confinement of detainees under worse conditions than convicted prisoners. 371 F.Supp. at 623. We agree with these propositions and rely, as did the district judge, upon the considerable number of recent decisions applying them.

In accord, First Circuit: *Inmates of Suffolk Co. Jail v. Eisenstadt*, 360 F.Supp. 676, 685-8 (D.Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974); Second Circuit: *Rhem v. Malcolm*, supra at 622-4 (S.D.N.Y. 1974), *aff'd*, supra at 336-8 (2nd Cir. 1974); Third Circuit: *United States ex rel Tyrrell v. Speaker*, 535 F.2d 823, 827 (3rd Cir. 1976); Fourth Circuit: *Patterson v. Morrisette*, 564 F.2d 1109, 1110 (4th Cir. 1977); Fifth Circuit: *Pugh v. Rainwater*, supra at 1191-2 (5th Cir. 1977) (dicta); *Miller v. Carson*, 401 F.Supp. 835, 865-7 (M.D.Fla. 1975), *aff'd*, 563 F.2d 741, 746-50 (5th Cir. 1977); Sixth Circuit: *Jones v. Wittenberg*, 323 F.Supp. 93, 99-100 (N.D.Ohio 1970), *aff'd sub nom Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); Seventh Circuit: *Duran v. Elrod*, 542 F.2d 998, 999-100 (7th Cir. 1976); Eighth Circuit: *Hamilton v. Love*, 328 F.Supp. 1182, 1191-2 (E.D.Ark. 1977); *Ahrens v. Thomas*, 434 F.Supp.

873, 897-8 (W.D.Mo. 1977), *aff'd*, 570 F.2d 286 (8th Cir. 1978); Ninth Circuit: *Brenneman v. Madigan*, 434 F.Supp. 128, 135-7, 142 (N.D.Cal. 1972); *Inmates of San Diego County Jail v. Duffy*, 528 F.2d 954, 956 (9th Cir. 1975); District of Columbia Circuit: *Campbell v. McGruder*, 416 F.Supp. 100, 104-5 (D.D.C. 1975), *aff'd* 580 F.2d 521, 527-33 (D.C.Cir. 1978).

Further support for this principle and its application to the conditions of pre-trial confinement comes from professionally recognized standards. The ACA Standards in its "Discussion" of Standard 5252, states, "Persons awaiting trial are not in the same class as those serving sentences. Because they are presumed innocent, only the least restrictive means necessary should be used to maintain them in custody." (p. 54)[13] The American Correctional Association, *Manual of Correctional Standards* (1966) Declaration of Principles, Principle V, recognizes that:

> Until the guilt of the suspected offender has been established in the course of due process of law, he should be considered innocent and his rights as a free citizen should be respected, except for such restraints as are indispensable to insure the proper investigation and trial.
>
> at p. xx

In accord: National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973) (hereafter NAC Standards) Standard 4.8 and Commentary at 133-4; National Sheriffs' Association, *Inmate Rights* (1974) at 19; The American Bar Association, *Tentative Draft of Standards Relating to the Legal Statuts of Prisoners*, 14 American Crim. L. R. 1 (1977) (hereafter ABA Tent. Standards), Standard 7.1 and Commentary at 565-9; United Nations *Minimum Rules for the Treatment of Prisoners and Related Recommendations* (U.N. Department of Economic and Social Affairs, 1958) Rule 84 at 7; American Law Institute, *Model Penal Law* (1962) at § 303.1; and Law Enforcement Assistance Administration, Department of Justice, *Guidelines for Planning and Design of Regional and Community Corrections Centers for Adults* (1971) (hereafter LEAA Standards) at E.4.1. The Federal Bureau of Prisons itself accepts this elementary principle in materials it provides to assist local pre-trial facilities: "Every accused person, rich or poor, is presumed to be innocent until proven guilty. Legally, the only assurance that properly can be demanded of an accused person is that he will be present for trial."[14]

[13] The ACA Standards indicate that Norman Carlson, one of the petitioners herein was President-elect of the ACA (p. xvi) and that he was a member of the Commission on Standards and Accreditation, which approved and administers the Standards (p. xvi-xvii).

For many years, the Department of Justice has strongly supported this view when dealing with state and local institutions. The Department has an extensive docket of cases which challenge the conditions and treatment of pre-trial detainees across the nation. Illustrative of the Department's position is the following from its trial memorandum dated November 16, 1977, in the case entitled *Davis v. Montgomery County Jail* (Civ. #76-205-N) and filed in the United States District Court for the Middle District of Alabama:

> In gauging the (Fourteenth) Amendment's applicability it is first necessary to note the age-old right to freedom before conviction; the presumption of innocence is fundamental in society . . . (p. 7)

[14] U.S. Bureau of Prisons, Department of Justice, *New Roles for Jails: Guidelines for Planning*, ed. Richmond and Aderhold (June 1969).

> With respect to persons awaiting trial this principle (the presumption of innocence) means that any burden on them may be no more restrictive than necessary to assume their appearance at trial. The method chosen must be the least restrictive of all alternatives. (p. 8).

See also, *Adams v. Mathis*, No. CA 74-70-S (M.D.Ala.) (In this case against the Houston County, Alabama, Jail the United States Attorney appeared as *amicus curiae* and the Civil Rights Division for the United States as plaintiff-intervenor); *Tyler v. Percich*, No. 74-40 C(2) (E.D.Mo.) (In this St. Louis, Mo. jail case, United States first appeared as litigating *amicus curiae* and later as plaintiff-intervenor); *United States v. Elrod*, No. 76-C 4768 (N.D.Ill.) (In this Cook County Jail case the United States filed the lawsuit); and *Vest v. Lubbock County*, No. 5-76-53 (N.D.Tex) (In this Lubbock County, Texas Jail case, the United States appeared as plaintiff-intervenor). In each of these cases, the United States argued for the position quoted from *Davis v. Montgomery County Jail, supra* with respect to the treatment of pre-trial detainees in *state* detention facilities.

C. The Results Of These Legal Developments Have Been Encouraging And This Court Should Not Impede Those Efforts Prematurely.

The Department's position would inevitably, if adopted by this Court, turn back the clock on all of the efforts, including those of the Department of Justice itself, made in the last decade to improve the conditions for pre-trial detainees in our jails. It is clear that appropriate judicial intervention has been a major catalyst for improving the conditions of confinement for many pre-trial detainees. To adopt the position argued by the United States in this

case would undermine this important progress. It is instructive, therefore, to look at what has been accomplished and what remains to be done. As Petitioner Norman Carlson, Director of the Federal Bureau of Prisons, said recently:

> The judiciary has compelled penal administrators, executive officials, and legislators at all levels of our society to face squarely the problems associated with treatment of offenders and has spurred constructive action to resolve these problems. As we move into the third century of the nation's history it is virtually certain that the courts will take further steps to awaken all Americans to the need for less crowded, more humane penal institutions, which are secure enough to protect society without creating conditions that threaten the basic rights of inmates and which permit both inmates and prison staff to work and live with a larger degree of safety and dignity.[15]

An overall assessment of the impact of judicial intervention is yet to be made. Nevertheless, we do have the results of several independent evaluations and other indicators that illustrate that while there is a long way to go, significant improvements have been made.

In one widely known study commissioned by the Law Enforcement Assistance Administration of the Department of Justice, the researchers looked at the impact of federal

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15 Norman Carlson, *Corrections in the United States Today*, 13 Am. Cr. L.R. 635 (1976). Also see, testimony of former New York City Commissioner of Correction McGrath in *Rhem v. Malcolm*, 371 F.Supp. at 636 and Minnesota Corrections Commissioner Kenneth Schoen letter in *The Civil Liberties Review* (Jan.Feb. 1978) at 6 and 80.

court decrees in three separate jail cases.[16] Those decrees were all based upon judicial findings of unconstitutional conditions and treatment of prisoners.[17] As a direct result of the court's orders, the following occurred:

(1) *Holland v. Donelson* – overcrowding was controlled; "all prisoners received beds; tension decreased, safety was enhanced and maintenance (of physical facilities) improved." The population limits resulted in the implementation of programs which reduced "the number and length of detentions." The delivery of medical services was improved.[18]

(2) *Collins v. Schoonfield* – ended long and arbitrary punishment under "harsh conditions;" communication with the free world, food, medical care, and standards of punishment" were improved; the general level of sanitation was also improved.[19]

(3) *Hamilton v. Schiro* – the decision contributed to a "reduction in the number of incidents of violence, [m]edical services were improved under a contract with a public hospital and improvements and renovation of the physical structure was commended."[20]

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16 Harris and Spiller, *After Decision: Implementation of Judicial Decrees in Correctional Settings*, (United States Government Printing Office, October 1977).

17 *Hamilton v. Schiro*, 338 F.Supp. 1016, 1017 (E.D. La. 1970); *Holland v. Donelson* (unreported decision) Civil Action #71-1442 8C (E.D.La. 1973) Sl.Op. 6; and *Collins v. Schoonfield, supra* at 258.

18 See n.16 at 22.

19 See n.16 at 23.

20 See n.16 at 23.

Although the study found that "life in the facilities was . . . still dismal" and "seriously overcrowded," judicial intervention had the salutory effects of "creating pressure for management reforms," including increased funding, changes in personnel policies, additional personnel and new facilities."[21] Most importantly, judicial intervention was perceived as focusing public attention on jail and prison conditions and as "rais[ing] correctional policy issues to the level of public concern."[22] As a result of this increased public education, "[l]egislative, regulatory and supervisory bodies adopted rules, provided funds, and took other actions that facilitated correctional improvements."[23] Administrators learned:

> that the substantive changes required were desirable and necessary. Once administrators discovered that the operational changes required by court decree were sound and feasible, there was a movement toward an anticipatory stance. Correctional administrators resolved to keep abreast of the thinking of courts and standard-setting bodies and to make appropriate changes without being ordered to make them.[24]

In *Palmigiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977), the Court found that both pre-trial detainees and convicted offenders were being subjected to numerous conditions of confinement which fell below constitutional minima. Pre-trial detainees in *Palmigiano* were subjected to the same

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21 See n.16 at 24.

22 See n.16 at 26.

23 See n.16 at 26.

24 See n.16 at 27.

deplorable physical conditions and rampant violence as were convicted offenders. As a result of the court's order, the pre-trial detainees in Rhode Island are now being housed separate from other offenders and are no longer subjected to the threat of violence which existed in 1977.[25] Similarly, at the time of the court order pre-trial detainees in Rhode Island were being subjected to medical care so deficient that the court labeled it "life threatening." Again, as the result of the court order, there have been "remarkable improvements" in the delivery of medical care for all prisoners in Rhode Island in the last year and the life threatening situation no longer exists.[26]

Taylor v. Perini, a case filed in 1969 in the United States District Court for the Northern District of Ohio, presents another example of the importance of judicial intervention. As a result of the proceedings in this case involving a challenge to the conditions of confinement of Ohio prisoners at that state's Marion Correctional Institution, a detailed consent order was entered. This order, required, among other things, changes in correspondence and publication policies (including termination of a publishers-only rule), disciplinary policies, a limitation on the length of disciplinary segregation, housing and work assignment policies in order to halt racial discrimination, and the creation of an effective inmate grievance procedure. 413 F.Supp. 189, 194-7 (N.D.Ohio 1976) (Order entered in 1972). A special master was appointed to investigate and report to the court on

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25 443 F.Supp. at 973.

26 See the first annual report of the court appointed special master, Allen Breed, now Executive Director of the National Institute of Corrections, United States Department of Justice.

the state of compliance with its order. Thereafter the master issued a series of reports, all of which were confirmed by the court. 413 F.Supp. 189, 198 (First Report); 421 F.Supp. 740, 742 (N.D.Oh. 1976) (Second Report); 431 F.Supp. 566, 570 (N.D.Oh. 1977) (Third Report); and 446 F.Supp. 1184, 1186 (N.D.Oh. 1977) (Fourth Report). This report was also confirmed by the district court. Recently, the master filed his Fifth Report in which he stated that the prison authorities had "achieved substantial compliance"[27] with the 1972 order and as a result of this accomplishment "the time had arrived for the Court to terminate ongoing supervision of the defendants' activities." 455 F.Supp. 1241, 1255 (N.D.Oh. 1978). The district court confirmed this recommendation as well. The teaching of these cases overwhelmingly demonstrates not only the necessity and feasibility of this approach to prison and jail cases but the impact of cooperative efforts to bring about necessary change.

In conclusion, the government has failed to give any adequate reason to depart from the deeply rooted legal principle of the presumption of innocence and its application to the conditions of pre-trial detention. Moreover, and most importantly, the government has utterly failed to give any adequate reason to ignore the results and experience of the last decade of judicial scrutiny which has helped to encourage progress in bringing the nation's jails up to minimum constitutional standards.[28]

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27 With respect to the implementation of a grievance procedure, the Ohio Department of Rehabilitation and Correction issued administrative regulations on December 26, 1976, requiring that all of Ohio's correctional facilities establish grievance procedures on the Marion model. 431 F.Supp. at 571.

28 For a similar analysis by Marshall, J. in the context of law libraries for prisoners, see *Bounds v. Smith,* 430 U.S. 817, ___, 97 S.Ct. 1491, 1499 (1977).

II. THE OPINION AND JUDGMENT OF THE SECOND CIRCUIT COURT OF APPEALS PROVIDE NO SPECIAL AND IMPORTANT REASONS FOR REVIEW BY THIS COURT AS REQUIRED BY RULE 19 AND THE WRIT OF CERTIORARI SHOULD THEREFORE BE DISMISSED AS IMPROVIDENTLY GRANTED

As has been shown above, the opinion and judgment of the court below as to the appropriate constitutional standard to be applied to conditions of pre-trial detainees only reflects basic assumptions of Anglo-American jurisprudence which have been historically recognized by the courts of this country. Further, as will be shown below, the specific remedies required by the action of the courts below are required by virtually every set of recognized professional and correctional standards in existence – including the *Draft Standards* of the Petitioners and the standards adopted by the American Correctional Association. Moreover, the United States has for years, in litigation concerning state and county jails and prisons, urged successfully to courts throughout this country that deprivations such as those enjoined in this case violate the basic constitutional rights of detainees and prisoners. Thus, neither the standard utilized in the Second Circuit Court of Appeals nor the specific remedies sustained and challenged in the Petition establish "special and important reasons" for review by this Court.

A. The Standard Of Review Recognized By The Court Of Appeals Is Deeply Rooted In American Jurisprudence And Is Recognized By Other Courts

The opinion of the court of appeals does not raise any unique or unresolved constitutional question. Everyone, including the government, at least rhetorically, recognizes that: (1) Pre-trial detainees are presumed to be innocent (Pet.

Brief 37, 38); (2) The only objective of pre-trial confinement is to insure the detainee's presence at trial (Pet. Brief 43); and (3) Pre-trial detainees cannot be "punished" at all (Pet. Brief 39, 40).

The case only takes on any particular significance as a result of the novel, radical and regressive theory posited by the United States that this Court should, in order to reverse the remedies ordered below, ignore the fundamental premise that pre-trial detainees are presumed to be innocent and adopt their new "three-tier" standard. As has been stated above, this standard, for all practical purposes, limits deprivations only when they rise to the level of cruel and unusual punishment under the Eighth Amendment.

There is presently no substantial dispute among the appellate courts as to the applicable constitutional standard to be applied in pre-trial detainee cases and certainly none of them have ever adopted the present position of the government in this case.

The preeminent case on this issue is, in fact, *Rhem v. Malcolm, supra,* the precursor in the Second Circuit to *Wolfish.* The court therein enunciated the long-standing doctrine that pre-trial detainees cannot be deprived of the rights of other citizens to a greater extent than is necessary to assure appearance at trial and security of the jail, or, in other words:

> the conditions of incarceration for detainees must cumulatively add up to the least restrictive means of achieving the purpose requiring and justifying the deprivation of liberty.
>
> Citing *Hamilton v. Love,* 328 F.Supp. 1182, 1192 (E.D.Ark. 1971). *Rhem, supra* at 351.

Obviously, as was specifically stated by the court of appeals, not *all* deprivations rise to the level of constitutional significance. Further, deprivations which are related to the purpose of confinement and are "compelled by administrative necessity" are allowed. *Wolfish, supra* at 120.

The totally inaccurate representation by the government that the standard adopted by the court of appeals requires a compelling necessity for "every" deprivation and is "unlimited" in application is simply a misreading of the clear language of the decision. In fact, various "deprivations" were allowed to remain intact by the lower court. The removal of these deprivations would have clearly made life more comfortable and consonant with free-world living.

Rhem v. Malcolm has been generally cited and adopted by other courts of appeal as representing the appropriate standard to be used.

In *Taylor v. Sterrett,* 532 F.2d 462, 470, 472 (5th Cir. 1976), the Fifth Circuit Court of Appeals, citing *Rhem,* stated that pre-trial detainees must be held under the least restrictive means necessary to assure their presence at trial and that if a practice or procedure was justified by jail security then there had to be a showing that there was no reasonable alternative means available to meet the security need. See also, *Pugh v. Rainwater,* 557 F.2d 1189, 1191-2 (5th Cir. 1977). In a later case, the same court stated, "Pre-trial detainees are not to be subjected to any hardships except those absolutely requisite for the purpose of confinement only." *Miller v. Carson,* 563 F.2d 741, 747 (5th Cir. 1977).

In *Campbell v. McGruder,* 580 F.2d 521 (D.C. Cir. 1978), the court discredited the government's derogation of the pre-

sumption of innocence to an evidentiary rule (Pet. Brief 37, 38) by stating that to construe the presumption of innocence as "largely irrelevant" to the condition of pre-trial confinement is "to profoundly misconstrue it." The court then cited *Rhem* for the proposition that if deprivations are based upon reasons unrelated to confinement alone, then those deprivations are to be justified by a *compelling* necessity. *Id* at 529, 531. The United States cites *Campbell* to support its rather extraordinary position that unless "fundamental interests" under their three-tier formula are effected, due process is satisfied if the conditions or practices are "reasonable in light of the valid government objectives in maintaining jail order and security *and of substantial considerations of fiscal economy or administrative feasibility"* (Pet. Brief 45). To the extent that the *Campbell* court allowed reliance on costs at all, it limited that factor to "substantial necessities of jail administration" and "feasible costs" after a careful examination of "each" restriction of the "jail regime" *Id* at 531. Further, the court explicitly stated that even if "feasible costs" were relevant, that factor could not be "determinative" of constitutional rights. *Id.* at 540.

It is difficult to conceive of how a judge could rationally utilize the government's standard of "fiscal economy" when, as in this case, the Petitioner presumably could have access to billions of dollars in the treasury. More importantly, the government's position lends itself to allowing irresponsible officials to totally stifle courts by simply lowering budgets for jails or prisons.

On the other hand, the *Campbell* language concerns "feasible costs." If the cost is "not feasible" then the act required can't be done at all and presumably the jailer could justify the action or lack thereof under the traditional "compelling interest" standard. See *Campbell, supra* at 538.

Moreover, the attempted "fiscal economy" justification for constitutional deprivations has been universally rejected. See, e.g., *DiMarzo v. Cahill, supra; Rhem v. Malcolm, supra; Miller v. Carson, supra; Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974); *Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977); *Watson v. City of Memphis,* 373 U.S. 526 (1963); *Goldberg v. Kelly,* 397 U.S. 254 (1969); and *Griffin v. Illinois,* 351 U.S. 12 (1956). See also, *Battle v. Anderson, supra,* Brief for Plaintiff-Intervenor United States (August 15, 1977) ("Constitutional requirements may not be limited by monetary considerations"). This case also does not present a real issue of whether or not fiscal matters can be considered in the fashioning of the remedy that will cure the constitutional deprivations found.

In *Inmates of San Diego County Jail v. Duffy,* 528 F.2d 954, 956 (9th Cir. 1975), the court reversed a district court decision which had not utilized the enhanced standard to be applied in the case of pre-trial detainees and ordered that court to reconsider its decision "in light of the rationale of . . . *Rhem v. Malcolm.*" Similarly, in *Patterson v. Morrisette,* 564 F.2d 1109, 1110 (4th Cir. 1977), the court noted that the standard it applied to pre-trial detainees was in accord with *Rhem,* as did the Third Circuit Court of Appeals in *United States ex rel Tyrrell v. Speaker,* 535 F.2d 823, 827 (3rd Cir. 1976). See also, *Smith v. Shimp,* 562 F.2d 423 (7th Cir. 1977).

Indeed, the only court of appeals case which has addressed the issue directly and which substantially deviated from the *Rhem* standard is *Feeley v. Sampson,* 570 F.2d 364 (1st Cir. 1978). *Feeley,* which the government must rely upon to support its position, is an historical accident and does not at this time represent the views of the First Circuit. The majority in *Feeley* only included one active

sitting judge from the First Circuit, Judge Campbell. The other judge in the majority was sitting by designation from the United States Court of Customs and Patent Appeals. Cheif Judge Coffin, dissenting in *Feeley,* cited to *Rhem* and other similar cases to indicate that ". . . the almost universal state of authority is in stark disagreement with the court's [majority's] analysis." 570 F.2d at 377, 379. Judge Bownes, who as the district court judge in *Feeley* had utilized the *Rhem* standard, now sits with Judges Coffin and Campbell as the three active judges of the First Circuit.[29]

After being elevated to the court of appeals, Judge Bownes, writing for the entire court in *DiMarzo v. Cahill, supra,* at 20, noted that "many courts have held that pre-trial detainees are to be confined only to the degree necessary to guarantee their presence at trial," citing *Rhem* and other similar cases. Although the First Circuit did not feel it necessary to expressly disapprove of the *Feeley* standard in *DiMarzo,* it clearly no longer has vitality for a majority of that court.

Consequently, there is no disagreement among the Circuit Courts of Appeals that should prompt this Court to seriously consider reversing the historically and generally accepted standard for pre-trial detainees.

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29 For consistent pre-*Rhem* decisions on jails by Judge Bownes, see *Smith v. Sampson,* 349 F. Supp. 268 (D.N.H. 1972) and *Conklin v. Hancock,* 334 F. Supp. 1119 (D.N.H. 1971).

B. The Specific Holdings Of The Court Below Challenged By The Government Are Consistent With All Recognized Professional Standards And This Is Not An Appropriate Case In Which To Challenge The Constitutional Standard To Be Applied To Conditions Of Confinement For Pre-Trial Detainees.

This case in no way presents a challenge to the structure of the Metropolitan Correctional Center. The only issue before the Court relating to structural deficiencies was created by the Bureau of Prisons double-celling two people in a 75 sq. ft. space designed and suited to house only one person.[30] The other four specific practices which were enjoined and are presented to this Court are: the prohibition on the receipt by detainees of books, magazines and other written material from any source other than the publisher or book-clubs – the "publishers only" rule; the prohibition of the receipt of any and all packages by inmates (except for one food package at Christmas); the practice of conducting a strip search of detainees after every contact visit which required that the detainee remove all of his/her clothing, display his/her hands and armpits, open his/her mouth, lift his genitals, display the soles of his/her feet, bend over and spread his/her buttocks for a visual anal inspection, and, for

[30] The collateral and serious deprivations to prisoners which were caused by this action and which were ruled upon by the trial court in finding that the double-celling in this case was unconstitutional are amply provided in the Respondents' Statement of the Facts. Contrary to the suggestions in the government's brief (e.g. at p. 54), no party is arguing that this Court should go beyond the facts in this case and hold that double-celling under any and all conditions is unconstitutional.

female inmates, a visual vaginal inspection;[31] and, the random searches of cells without the presence of the detainee.[32] By enjoining all five practices, the trial court required no more than any current set of recognized minimum standards which address those issues does.

Of particular note in this regard are the *Draft Federal Standards for Corrections* published in June of this year by the United States Department of Justice after being drafted by the Bureau of Prisons and other Justice Department personnel, including Petitioner Carlson. In his introduction to the *Draft Standards* Petitioner Attorney General Bell, identified the goals of the standards to be: (1) to be responsive to constitutional issues; (2) to promote practices that are humane and responsive to the constitutional rights of the individual; and (3) to promote practices which will ensure that correctional facilities are safe, secure and manageable (at p. 1).[33] Petitioner Bell further stated "that the standards might be looked to in fashioning a remedy when a court independently finds constitutional or legal violations have occurred." and that

[31] The trial judge found this process to be "unpleasant, embarrassing and humiliating" as well as not rationally related to security interests at the M.C.C.

[32] The trial judge found that this practice raised tension and hostilities and that destruction of detainee property could be reduced by allowing the detainee to remain a reasonable distance away. The court of appeals added there was *no reason* to deprive the detainee of this privilege.

[33] Obviously, the drafters and Petitioners Bell and Carlson determined that the standards as drafted would not compromise security interests of jailers or be unmanageable. Further, it appears that the drafters were attempting to set a basic level of conditions which must be maintained to be "humane." The government in its brief at p. 24 concedes that detainess must be afforded "humane" living conditions.

> the Department of Justice must . . . be willing to embrace the goals and objectives set forth in the standards and apply those standards to its own correctional program (at 2 and 3).

The *Draft Standards*, which apply to jails, speak to four of the five specific issues before the Court and, after taking security needs into account, are inconsistent with the government's position on each of the four. The standards require: (1) all cells designed for single occupancy house only one person and that there is at least 60 sq. ft. per prisoner of living space (excluding activity space) as opposed to the 37½ sq. ft. provided by the double-celling at the Metropolitan Correctional Center (Physical Plant 002, 004-006); (2) prisoners and detainees can receive books and other publications from sources other than the publisher (Mail and Visiting 002); (3) no limit on receipt of mail or other publications, including packages, except where there is clear and convincing evidence to justify the limitation (Mail and Visiting 002); and (4) the use of nonintrusive sensors and other techniques instead of body searches whenever feasible; and prohibition of visual inspection of body cavities except where there is a "real suspicion" and, when conducted, a requirement that they be conducted in a manner whereby the "dignity and integrity" of the individual will be preserved (Security and Control 013). It is certainly anomalous that the same government which has determined that the above standards would support constitutional, humane and secure institutions would rely upon fiscal feasibility and a rational relation test to defend inconsistent practices in one of their own jails.

Other more established professional standards dictate the same conclusions. The American Correctional Association has existed since 1870 as the professional organization for

correction personnel. In December of 1977, that association produced its *Manual of Standards for Adult Local Detention Facilities.* The primary goals were to assure: 1) security; (2) humane and efficient management of inmates; and 3) provision of services necessary to maintain the physical, social and emotional health of inmates (p. xix). Moreover, the standards were successfully field-tested in jails in Illinois, California and Maryland. Those standards require that: (1) cells designed for single-occupancy house only one person and that cells have at least 60 sq. ft., except that the minimum increases to 80 sq. ft. if the person is held in the cell for more than 10 hours a day (5102, 5103, p. 21); (2) there is no limitation on the volume of mail an inmate may send or receive, unless there is clear and convincing evidence to justify such limitation (5307, p. 64); (3) searches should be conducted no more frequently than necessary and in a manner so as to avoid embarrassment or indignity to the inmate. Nonintrusive sensors and other techniques instead of body searches should be used whenever feasible and the presence of health care personnel is required at the time of body searches (5246, 5270, pp. 50, 56); and (4) Inmates should be in the vicinity of their cells when any search of said cells are being conducted (5213, p. 44).

The National Sheriff's Association in 1974 published a set of standards for the jails for which they are responsible. Those standards provide for: (1) single occupancy cells with 70 to 80 sq. ft. of living space within the cell (*Jail Architecture*, pp. 62, 63); (2) inmates having access to a wider range of reading material (*Inmate Legal Rights*, p. 44); and (3) inmates' presence during any search of his/her cell (*Jail Security, Classification and Discipline*, p. 45).

Other special purpose professional groups have addressed the particular issues raised in this case which are within their area of expertise. For example, the *ABA Tent. Standards* provide for the receipt of packages subject to them being opened and searched, §6.1(d), and the presence of the prisoner at his or her cell when a search is being conducted, except in an emergency, §6.6(d). The American Public Health Association's *Standards for Health Services in Correctional Institutions* (1976) for public health reasons require a minimum of 60 sq. ft. of living space in single-occupancy cells and 75 sq. ft. in multiple-occupancy living areas with at least half that amount of space additionally provided for activity area (pp. 62, 63).

Suffice it to say that although all standards developed by reputable professional organizations contain some standards in support of the remedies objected to by the government, *amicus curiae* has been unable to find any standards which support the government's positions.

Moreover, local and state authorities have adopted standards for facilities which recognize that the specific remedies required by the lower court in *Wolfish* are not only needed but workable. Of particular note are the New York City Board of Correction *Minimum Standards for New York City Correctional Facilities* which, of course, are to be applied to jails in the very geographical location as the Metropolitan Correctional Center. Those standards provide: (1) a cell or room designed for single occupancy shall house only one prisoner, and multiple-occupancy areas shall provide a minimum of 75 sq. ft. per person in the sleeping area (§5.2, p. 5); (2) publications can be received from any source (§14.1, p. 2); and (3) prisoners are allowed to receive packages from any person (§13.1, p. 14). Similarly, the *Corrections Standards and Goals* produced by the New

York State Division of Criminal Justice Services provide for: (1) no double-celling in single-occupancy cells (§5.1(c), p. 17); (2) prisoners are allowed to receive publications from any source (§5.11, p. 31); (3) packages can be received by prisoners subject to search (§5.11, p. 13); (4) inspection of anal or vaginal cavities can be done only with probable cause (§5.14, p. 35); and (5) prisoners are to be present to observe searches of cells when they are made (§5.14(e), p. 34).

In light of the above, the government's argument that the remedies in issue are required by fiscal or security needs seem hollow. Moreover, in its own actions in cases where it is not defending Federal Bureau of Prisons' practices but litigating over state and local facility practices and conditions, the United States has never taken any position consistent with those taken in *Wolfish*, but has rather always taken positions consistent with those of the lower courts when the issues have been raised.

For example, in the Final Memorandum of the United States of November 16, 1977 in the case of *Davis v. Montgomery County Jail*, (M.D.Ala.) C.A. #76-205-N, the government maintained as an *amicus curiae* that only one person could be housed in a single-occupancy cell and that each cell had to contain at least 60 sq. ft. of living space (p. 11). A similar position was taken as Plaintiff-Intervenor in both their Trial Memorandum and Brief in the Fifth Circuit Court of Appeals in *Adams v. Mathis*, (M.D.Ala.) C.A. #74-70.S, *supra*. In *Battle v. Anderson*, *supra*, as Plaintiff-Intervenor, the United States in its Brief to the Tenth Circuit Court of Appeals (No. 77-1554) specifically urged that 39 sq. ft. per prisoner (1½ sq. ft. more than allowed at the Metropolitan Correctional Center) was unconstitutional and that the appropriate constitutional standard would be a minimum of

60 sq. ft. in single cells and 75 sq. ft. in multiple-occupancy room s(pp. 12, 16). The same position was taken as *amicus curiae* in the case of *French v. Owens*, (S.D.Ind.) C.A. #75-677-C, in the United States' Proposed Findings of Fact, Conclusions of Law and Order signed on September 11, 1978. See also, *Pugh v. Locke, supra; Costello v. Wainwright*, 397 F.Supp. 20 (M.D.Fla. 1975), *rev'd on other grounds*, 539 F.2d 547 (5th Cir. 1976), *rev'd*, 430 U.S. 325 (1977) and *Ruiz and United States v. Estelle*, No. 72-H-1393 (S.D.Tex).

In spite of the "security" interest asserted in *Wolfish* concerning the "publishers only" rule and the ban on the receipt of packages, the United States' Comment on the Proposed Compromise and Dismissal filed in the district court in *Guajardo v. Estelle*, 432 F.Supp. 1373 (S.D.Tex. 1977), *rev'd in part*, 580 F.2d 748 (5th Cir. 1978) stated, "It is difficult to perceive how the 'publishers only rule' is necessary or essential to any legitimate penal interest" (p. 8) and that "the exclusion of all packages is unduly restrictive. . . If the goal is the exclusion of contraband, there are less restrictive means of achieving this end" (p. 4). See also, *Battle v. Anderson, supra* and *Gates and United States v. Collier*, 390 F.Supp. 482, 494 (N.D. Miss. 1975).

One cannot assume that the United States for years, and up until the recent date, has been forcing state and local governments through constitutional litigation to adopt practices that are fiscally or administratively not feasible, or are a threat to the serious security interests of the jailor or are not required, in the government's mind, by the Constitution. That this same government is now reaching for new and regressive positions to defend practices at its own jail seems clear.

As then Judge, now Petitioner Attorney General Bell, has stated:

> I concur specially to indicate my agreement with the result reached by the majority, and also to record my continuing belief that all police and ancillary personnel in this nation, whether state or federal, should be subject to the same accountability under law for their conduct . . . It is regrettable that we have one law for Athens and another for Rome.
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> *Anderson v. Nosser*, 438 F.2d 183, 190 (5th Cir.1971)

In sum, it is clear from concepts deeply rooted in our history, from the present state of the law, from the various sets of professional minimum standards and from the past a and present positions taken by the United States concerning state and local prisons and jails that the decision of the court below was correct and that the facts and issues raised in this case do not provide special and important reasons for review by this Court as is required by Rule 19, Supreme Court Rules.

CONCLUSION

The writ of certiorari in this case should be dismissed as improvidently granted or, in the alternative, the judgement of the court of appeals should be affirmed.

Respectfully submitted,

EDWARD I. KOREN
RALPH I. KNOWLES, JR.
MATTHEW L. MYERS
ALVIN J. BRONSTEIN
The National Prison Project of the
American Civil Liberties Union
Foundation
1346 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 331-0500

Attorneys for Amicus Curiae